Decision **DRAFT DECISION OF ALJ PULSIFER (Mailed 5/31/2005)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service.	Rulemaking 95-04-043 (Filed April 26, 1995)
Order Instituting Investigation on the Commission's Own Motion into Competition for Local Exchange Service.	Investigation 95-04-044 (Filed April 26, 1995) **(FCC Triennial Review Nine-Month Phase)**

ORDER CLOSING THE TRIENNIAL REVIEW NINE-MONTH PHASE

I. Introduction

By this decision, we close the phase of this proceeding designated as the "Federal Communications Commission (FCC) Triennial Review Nine-Month Phase." This phase of the Local Competition rulemaking was initiated to implement provisions of the FCC Triennial Review Order (TRO), adopted on February 20, 2003,[1] and effective on October 2, 2003. As explained below, however, the original purpose for which the TRO phase was initiated has been

[1] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, In the Matter of Review of the § 251 Unbundling Obligations of Incumbent Local Exchange Carriers (CC Docket No. 01-338); Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 (CC Docket No. 96-989); Deployment of Wireline Services Offering Advanced Telecommunications Capability (CC Docket No. 98-147), FCC No. 03-36, ¶ 669 (rel. Aug. 21, 2003) (hereinafter, "TRO").

superseded by subsequent events, including the issuance of the FCC's Triennial Review Remand Order (TRRO) regarding Unbundled Access to Network Elements.[2] Accordingly, we determine that the TRO phase should be closed. Any remaining disputes among carriers regarding the negotiation of interconnection arrangements to implement applicable change-of –law provisions resulting from the TRO and TRRO shall be addressed through carrier negotiations and consolidated arbitration applications, through the process explained below.

II. Procedural Background

As a context for disposition of the TRO phase of this proceeding, it is useful to review the sequence of events that have transpired since the TRO proceeding began. As originally mandated, the TRO proceeding was initiated to comply with directives from the FCC for state commissions to conduct a granular analysis of markets where competitive local exchange carriers (CLECs) were not impaired without access to certain designated unbundled network elements (UNEs). In such markets, the FCC directed that Incumbent Local Exchange Carriers (ILECs) would no longer be required to offer the designated UNEs. In markets where the UNE switching was to be eliminated, "batch hot cut" processes were to be implemented, with determination of applicable prices, to cut over CLEC lines from the UNE Platform (UNE-P) to separately provisioned UNE Loops (UNE-L) or other agreed-upon alternative arrangements.

[2] Order on Remand, In the Matter of Unbundled Access to Network Elements, WC Docket No. 04-313, CC Docket No. 01-338, adopted December 15, 2004, released February 4, 2005.

Before the issuance of an Administrative Law Judge (ALJ's) Proposed Decision in the TRO phase, on March 2, 2004, the United States Court of Appeals for the District of Columbia Circuit issued its opinion in *United States Telecom Association v. Federal Communications Commission*, No. 00-1012 (USTA II).[3] In USTA II, the Circuit Court vacated TRO provisions delegating authority to the states to make impairment findings and to conduct the substantive tests that the FCC had promulgated to support such determinations.

On June 18, 2004, an Assigned Commissioner's Ruling (ACR) suspended portions of the TRO proceeding as vacated by USTA II, setting aside submission, until the FCC issued new or interim rules. On June 24, 2004, a joint motion was filed by a group of competitive local exchange carriers, together with the Office of Ratepayer Advocates (ORA) and The Utility Reform Network (TURN), for Reconsideration of the June 18, 2004 ACR. Responses were filed in opposition to the June 24, 2004 joint motion on July 9, 2004.

A supplemental ACR, issued on July 2, 2004, stated that the batch hot cut phase of the proceeding would continue, and that USTA II did not exempt this Commission from implementing a batch cut process. On July 28, 2004, the ALJ's Proposed Decision on Batch Hot Cut Processes was issued.

On August 20, 2004, the FCC released its Order and Notice of Proposed Rulemaking (NPRM) regarding alternative unbundling rules to implement the obligations of Section 251(c)(3) of the Communications Act of 1934, as amended

[3] This Circuit Court Opinion is known as *USTA II*, where *USTA I* refers to a prior Circuit Court Opinion in *United States Telecom Association v. FCC*, 209 F.3d 415 (D.C. Cir. 2002) which had invalidated much of the FCC's previous efforts to identify network elements to be unbundled.

by the 1996 Telecommunications Act.[4] Parties filed responsive comments on the issue of its impact on this Commission's jurisdiction to issue a decision adopting and approving a batch hot cut process.

On October 27, 2004, an ACR was issued, setting aside submission in the batch hot cut phase of this proceeding and withdrawing the ALJ's Proposed Decision on Batch Hot Cut Issues. The ACR also took official notice of a New York Public Service Commission decision accepting Verizon California, Incorporated (Verizon's) batch hot cut process and setting permanent rates for that process as well as Verizon's "basic" and "project / large job" hot cut processes. (*New York Batch Hot Cut Order.*)[5] The ACR solicited comments on the significance of the *New York Batch Hot Cut Order* in relation to California's TRO proceeding, and the need for further proceedings before Commission consideration of a Batch Hot Cut Decision. In response to the October 27, 2004 ACR, parties filed comments concerning the *New York Batch Hot Cut Order.*

On November 3, 2004, MCI, Inc., AT&T Communications of California, Inc., Covad Communications, and the Pure UNE-P Coalition (the Joint Parties) filed a motion for the Commission to set aside the October 27, 2004 ACR, and to proceed with adoption of a Commission Decision on Batch Hot Cut issues.

On February 4, 2005, the FCC issued its "Order on Remand," adopted on December 15, 2004, and which became effective on March 11, 2005. The Triennial Review Remand Order (TRRO) provides guidance by the FCC

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[4] WC Docket No. 04-313 / CC Docket No. 01-338.

[5] *See* Order Setting Permanent Hot Cut Rates, *Proceeding on Motion of the Commission to Examine the Process and Related Costs of Performing Loop Migrations on a More Streamlined (e.g., Bulk) Basis,* No. 02-C-1425 (N.Y. Publ. Serv. Comm'n Aug. 25, 2004)("*New York Batch Hot Cut Order*").

concerning the process whereby carriers are to transition from the existing system of unbundled network elements to alternative arrangements.

On March 3, 2005, an ALJ ruling solicited comments on what further procedural action should be taken in response to the TRRO. Specifically, parties were to comment on whether, or for what purposes, there is any reason for the TRO phase to remain open in view of the Remand Order. In the event that the TRO phase is closed, parties were to identify any other procedural forum(s) and / or processes to facilitate implementation of the provisions of the Remand Order. Comments were filed on March 18, 2005, and reply comments were filed on April 1, 2005.

III. Position of Parties Concerning Closure of the TRO Proceeding

A. Position of SBC

SBC believes that the TRO phase no longer serves any useful purpose, and should be closed. SBC cites *USTA II* as vacating the rules under which the TRO phase was predicated. SBC also cites to the FCC's new rules which were issued in the TRRO. Given that the TRO rules have been vacated and superseded by new rules, SBC advocates closing this proceeding.

SBC opposes leaving this proceeding open in order for the Commission to adopt and implement batch hot cut processes and prices. SBC argues that there is no longer any FCC batch cut rule for this Commission to implement, observing that the FCC did not re-enact a batch cut rule in issuing the TRRO. Instead, SBC notes that in the TRRO, the FCC found "no impairment arising from the hot cut process for the majority of mass market lines" and that "the new hot cut processes developed by each of the BOCs significantly address" the issues previously noted in the TRO.

SBC also opposes keeping this proceeding open as a forum to litigate any line splitting issues. SBC, however, is willing to participate in collaborative efforts with competitors to work out the processes necessary to support line splitting.

To the extent the TRRO requires parties to amend their interconnection agreements to implement any of the FCC's new unbundling rules, SBC believes the proper vehicle is the normal negotiation and dispute resolution / arbitration process set forth in their interconnection agreements in accordance with § 252 of the 1996 Act. If one party believes another party is engaging in unnecessary delay in such negotiations, then SBC believes the dispute should be brought before the Commission as a new proceeding, involving just the specific parties to the dispute.

B. Position of Verizon

Verizon agrees largely with the position taken by SBC, except with respect to the determination of prices for the batch cut process. Verizon believes that the establishment of interim prices for Verizon's batch hot cut process is the one issue left to be resolved in this proceeding. Verizon claims that it has already agreed upon performance standards specifically applicable to its batch hot cut process, and submitted these proposed metrics to the Commission for approval in Rulemaking (R.) 97-10-016 (Re: Monitoring Performance of Operations Support Systems). Verizon argues that any issues concerning its performance can be addressed through the procedures created under that agreement.

With respect to its batch hot cut rates, Verizon advocates that the Commission adopt—at least on an interim basis—rates equal to those that have been established by the New York Public Service Commission. Verizon notes that the New York-approved rates are approximately one-half of the rates that

Verizon proposed both in New York and in California. Although Verizon claims the New York rates understate Verizon's actual costs, Verizon believes that adopting the New York rates is more defensible than setting its rates equal to those of SBC in California.

C. Position of the UNE-P Coalition

The Coalition believes this proceeding should remain open for the purpose of (1) issuing a final Commission decision on the batch hot cut process based on the record developed in this case, (2) signaling "preferred outcomes" for any arbitration that seeks implementation in an interconnection agreement of the still-valid provisions of the FCC's TRO and TRRO; (3) issuing a final decision in the collocation phase of OANAD so that post-UNE-P carriers have a chance of achieving reasonably priced interconnection with the ILECs; and (4) reaffirm, pursuant to state law, that ILECs are required to unbundled their networks for competitors at rates set at the ILECs' long-run incremental cost.

D. Position of MCI and Covad

MCI WorldCom Network Services, Inc. (MCI) and Covad Communications Company (Covad) argue that nothing in the TRRO affects the Commission's authority to proceed to a final determination regarding batch hot cut processes and pricing in this proceeding. MCI and Covad support adoption of batch hot cut processes based on the existing record and the July 28, 2004 Proposed Decision. At a minimum, they believe that the Commission needs to finalize its determination of batch hot cut prices based on the record in this proceeding. As an alternative to adopting the Proposed Decision in its present form, MCI and Covad propose collapsing the eight workshop sessions envisioned in the Proposed Decision into one workshop.

MCI and Covad believe that the most efficient vehicle to establish batch hot cut processes and prices is in a generic docket rather than in individual negotiations because the processes at issue are equally applicable to all CLECs. MCI acknowledges that it was among the parties that filed motions on March 1st and 2nd, 2005, indicating that individual interconnection agreement negotiations needed to be pursued in order to incorporate TRO and TRRO changes of law into their respective interconnection agreements. Among those issues to be incorporated through negotiations were those relating to batch hot cut processes. MCI now characterizes its position that batch hot cut processes be the subject of separate negotiations to be "borne of the immediate urgency of the circumstances as set forth in those motions and based on the fact that this generic proceeding had, at the time the motions were filed, disappeared into the void…" (Comments at 5.)

MCI and Covad argue that the TRRO makes it even more urgent for the Commission to proceed immediately to implement batch cut migration processes as adopted in the ALJ's Proposed Decision because the TRRO phases out UNE-P availability over a 12-month period. MCI and Covad argue that line splitting and line shared customers can only be migrated from UNE-P or ILEC retail to UNE loops by having their data services disconnected and reconnected as much as 10 days later. Thus, they express concern that without a migration process, CLEC customers served on line split or line shared loops will likely be forced to convert their service to SBC or Verizon.

IV. Discussion

The original FCC rules that served as the basis for the TRO Nine-Month Phase have been vacated and superseded by new rules in the TRRO. Under the new rules, the original premises and mandates underlying the TRO Nine-Month

phase no longer apply. Accordingly, we find no useful purpose in keeping the TRO phase open, and direct that the TRO Nine-Month Phase be closed. We recognize that remaining issues need to be resolved in order to implement applicable TRO and TRRO change of law provisions involving the elimination of UNE-P, including processes and pricing for batch hot cuts to convert the embedded customer base. We conclude, however, that the TRO phase is not the appropriate vehicle for that purpose. Instead, separate proceedings, consistent with TRRO directives, should be used to facilitate that implementation, as discussed below.

The TRRO contemplates a process of intercarrier negotiations to implement applicable change of law provisions, with close monitoring by the state commission to ensure that parties do not misuse the negotiation process to engage in unreasonable delay. In this regard, the FCC stated:

> We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. [footnote omitted] Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order. [footnote omitted] We note that the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes. [Footnote omitted] We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order. *We encourage the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay*. (TRRO, ¶ 233, emphasis added)

One significant area of such negotiations involves the batch hot cut process. In the TRRO, the FCC "establish[ed] a transition plan to migrate the embedded base of unbundled local circuit switching used to serve mass market customers to an alternative service arrangement." (TRRO ¶207.) That plan calls for a 12-month transition period beginning March 11, 2005, during which the embedded base would be migrated to alternative arrangements. Thus, a batch hot cut process is still required to accomplish this transition. Based on parties' pleadings, however, it is apparent that disputes remain, particularly with respect to batch hot cut pricing and processes for the conversion of CLECs' embedded base of mass market customers served by UNE-P.

Consistent with our mandated responsibilities to ensure that impasses in negotiations do not cause unreasonable delays, as noted above, we conclude that a separate arbitration proceeding is warranted as a forum to resolve remaining implementation disputes, including those relating to the process and pricing of batch hot cuts to convert UNE-P lines to alternative arrangements.

A separate arbitration proceeding can be tailored to the current role of the state commission of monitoring and facilitating resolution of disputes between carriers. The original TRO required state commissions "to approve and implement a batch cut migration process- a seamless, low-cost process for transferring large volumes of mass market customers…" (TRO ¶ 423.) This mandate was premised on the FCC's national finding that carriers serving the mass market would be impaired without access to unbundled local circuit switching based on "the combined effects of all aspects of the hot cut process" (TRO ¶ 470.)

The TRRO, however, no longer directs state commissions to approve and implement batch cut migration processes. Instead, the FCC now concludes that

"in light of changed circumstances and guidance received from the D.C. Circuit, we find no impairment arising from the hot cut process for the majority of mass market lines." (TRRO ¶ 210.) The TRRO further states:

> "In light of these new procedures [for batch hot cuts], we cannot conclude that the hot cut processes will be insufficiently scalable to handle those line that are transitioned from UNE-P to UNE-L arrangements. Rather, any inadequacies in carriers' hot cut performance can be addressed through enforcement of interconnection agreements and, in the case of BOCs, complaints pursuant to section 271(d)(6)." (TRRO ¶ 211.)

While the lack of a batch hot cut process no longer provides a basis for the FCC to find impairment warranting continuation of UNE-P, parties still need to reach agreement on batch hot cut terms and pricing. Parties need to proceed through the negotiation process to revise their interconnection agreements as to the processes and prices to apply to hot cut processes. As noted above, Verizon acknowledges the need for the Commission to adopt at least batch hot cut prices, but disagrees with CLECs concerning what prices should be adopted.

Parties also indicate that disputes remain with respect to the conversion process applicable to line splitting arrangements, at least for SBC. In the TRRO, the FCC "has chosen to encourage parties to use state collaboratives to work out the processes necessary to support line splitting…" (TRRO ¶ 217.) Thus, consistent with the FCC intent, state collaboratives are encouraged as a desirable means for parties to work out such line splitting disputes. Yet, to the extent such state collaboratives fail to result in a mutually agreeable voluntary resolution on line splitting arrangements on a timely basis, the matter must be submitted, along with other unresolved disputes, for arbitration.

As discussed below, we recognize that certain carriers have already entered into separate arbitrations of TRO and TRRO change of law provisions. In such instances, we agree that it may be appropriate to permit parties to continue to use those separate proceedings to resolve TRO and TRRO change of law implementation issues. For carriers that have not yet entered into separate arbitration proceedings, however, we conclude that consolidated arbitration proceedings can serve as an efficient means of resolving change-of law issues that are common to several carriers. In such situations where separate arbitration proceedings have not yet opened, we agree that individual, duplicative arbitrations would be wasteful of resources, and that instead, a consolidated arbitration should be used so that common issues affecting multiple parties can be addressed on the most efficient basis. We thus conclude that a consolidated arbitration proceeding is the appropriate forum through which to resolve remaining outstanding disputes concerning the renegotiation of interconnection agreements to reflect the change of law provisions of the TRRO. Such a procedural approach is consistent with our findings in Decision (D.) 05-03-028. In that decision, we ruled on motions raising the issue of how carriers were to proceed in implementing the change-of-law provisions from the TRRO.[6]

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[6] On March 1, 2005, and March 2, 2005, motions were filed, respectively, by groups of competitive local exchange carriers, seeking a Commission order forbidding SBC California (SBC) from rejecting new UNE-P orders beginning on March 11, 2005, the effective date of the Remand Order. Instead Movants requested a continuation of UNE-P requirements beyond March 11, 2005, pending further negotiations of interconnection agreements that the CLECs believed were necessary to comply with the change of law provisions as prescribed in the respective interconnection agreements. A similar motion was filed with respect to Verizon in Application (A.) 04-03-014.

As set forth in D.05-03-028, we affirmed the Assigned Commissioner's Ruling directing SBC to continue processing CLEC orders involving additional UNE-P lines for the embedded base of customers who already have UNE-Ps, until no later than May 1, 2005. On a similar basis, in D.05-03-027, we affirmed the Assigned Commissioner's Ruling directing Verizon to continue processing CLEC orders involving additional UNE-P lines for the embedded base of customers who already have UNE-Ps, until no later than May 1, 2005. For previously existing UNE-P lines, the TRRO provided for a transition period of 12 months from the effective date of the TRRO within which to transition the affected CLEC mass market customer lines from UNE-P to alternative service arrangements. (TRRO ¶ 227.)

SBC was directed not to unilaterally impose those provisions of its accessible letter that involve the embedded customer base until the company had either negotiated and executed the applicable interconnection agreements with the involved CLECs or May 1, 2005 had been reached. During the negotiation window, parties were instructed to negotiate in good faith interconnection agreement amendments to implement the FCC ordered changes. Commission staff was empowered to work with the parties to ensure that meaningful negotiations take place consistent with the FCC's directive to monitor the negotiation process to ensure that the parties do not engage in unnecessary delay.

As discussed further below, we recognize that where existing arbitration proceedings are in progress, it may be advisable to resolve pending issues raised in those proceedings within the existing arbitrations. On the other hand, for carriers that have not yet entered into arbitration proceedings, to the extent that disputes remain concerning implementation of the TRO and TRRO change of

law provisions, including the manner in which batch hot cuts are to be processed and priced during the 12-month transition period, those disputes shall be resolved through consolidated arbitration proceedings.

One consolidated arbitration proceeding should be used for all interconnection disputes with SBC California and a separate proceeding should be used for those disputes with Verizon California. In the case of Verizon, a mass arbitration proceeding is already pending in A.04-03-014. Parties to that proceeding have expressed differing views about whether A.04-03-014 is the proper forum to address TRRO implementation issues or whether a new application or petition should be filed, and whether CLECs have had a sufficient opportunity to negotiate TRRO issues.

We defer to the assigned commissioner and ALJ in A.04-03-014 to determine whether to use that existing arbitration proceeding to resolve disputes over TRO and TRRO implementation issues, or to order the opening of a new proceeding for that purpose. In either event, the existing TRO phase of this proceeding can be closed since any unresolved disputes will be addressed in through a separate arbitration application.

In the case of TRRO implementation disputes involving SBC, no consolidated arbitration has yet been opened, but an arbitration is currently pending in A.04-05-002 between XO California (XO) and SBC. While the arbitrator in that case has issued a Draft Arbitrator's Report resolving 21 disputed issues, parties have presented additional issues involving TRRO implementation for resolution. Another arbitration proceeding is also pending between MCI and SBC. In its comments on the Draft Decision, XO objects to the transfer of issues from A.04-05-002 (the Arbitration proceeding between XO and Pacific Bell Telephone Company d/b/a SBC California) to a newly opened

consolidated arbitration proceeding. XO indicates that the parties have devoted a great deal of time and effort to negotiate and arbitrate TRRO issues and await only a Draft Arbitrator's Report on those issues. XO argues that transferring the TRRO issues to a new consolidated docket would require SBC and XO to start over again, wasting most of the considerable resources they have expended. XO also expresses concern that such a transfer would delay resolution of the TRRO issues, perhaps beyond March 11, 2006, the end of the transition period for mass market switching and high capacity loops and transport (other than dark fiber). XO therefore asks that the TRRO issues in A. 04-05-002 not be transferred to the new docket for resolution.

If the Commission denies XO's request, as an alternative, XO proposes that the Commission clarify that only TRRO would be moved to the new docket, while keeping other issues, including those relating to the unvacated portions of the TRO, for resolution in A.04-05-002.

Similarly, MCI states that it has expended substantial resources, after months of negotiation, to respond to SBC's Section 252 ICA application for an individual interconnection agreement. Thus, MCI opposes the removal of TRRO and TRO implementation issues from its individual arbitration into a consolidated docket. MCI argues that it would suffer extreme prejudice if it were required to transfer and refile piece parts of its previous arbitration showing in some new consolidated proceeding.

Accordingly, for carriers such as MCI and XO that are already in the process of resolving TRO and TRRO change-of-law provisions through separate arbitration proceedings, we recognize that it may not be the most efficient use of resources to transfer disputes raised in those proceedings into a separate consolidated arbitration. Accordingly, we shall not at this time require the

transfer of such issues from those separate arbitration proceedings into a separate consolidated arbitration docket. We shall defer to the Assigned Commissioner and arbitrator in those proceedings to determine whether, or to what extent, any TRO or TRRO change-of –law issues should remain in the existing arbitration or should be transferred into a consolidated arbitration docket.

Yet, to the extent that issues relating to Batch Hot Cut processes and pricing are not being addressed within the separate arbitration proceedings of XO or MCI, we shall authorize XO and MCI to participate as parties in the Batch Hot Cut phase of the consolidated arbitration proceedings outlined above. In this manner, all interested parties may participate in a unified forum to resolve outstanding issues relating to Batch Hot Cuts. These new issues could easily be transferred to a new consolidated arbitration. Accordingly, within 10 calendar days of the effective date of this decision, we shall direct SBC to file an arbitration application on a consolidated basis for resolution of pending disputes with carriers over TRRO implementation issues. Any carrier that has a dispute with SBC over the terms of implementing change-of-law provisions of the TRRO is authorized to be a party of record in the consolidated arbitration.

Although we close the TRO phase of this proceeding, we shall permit parties to the consolidated arbitration proceedings to introduce previously admitted exhibits and related briefing materials from the TRO phase, to the extent they believe that they remain relevant in resolving remaining disputes over TRRO change-of-law implementation. The assigned ALJ in the consolidated arbitrations shall establish appropriate procedures to permit parties to identify relevant portions of the record from the TRO proceeding that they seek to introduce into the record of the consolidated arbitration proceeding.

Similarly, the assigned ALJ in the consolidated arbitration should establish a mechanism to transfer any pending issues from A.04-05-002 (the XO/SBC Arbitration) to the consolidated arbitration.

Also, to facilitate the exchange of discovery involving proprietary data, parties should enter into appropriate nondisclosure agreements. For this purpose, parties should incorporate the terms for nondisclosure as previously authorized in the Protective Order adopted in the TRO phase of this proceeding.

A. Issues raised by the UNE-P Coalition.

In comments to the Draft Decision, Verizon objects to including batch hot cut issues within the scope of a consolidated Section 252 arbitration proceeding based on the claim that there is no change of law in the TRRO or the unvacated portions of the TRO concerning batch hot cuts. Verizon thus argues that batch hot cut issues are outside the scope of the consolidated Section 252 arbitration which is for the purpose of conforming Verizon's interconnection agreements, where necessary, to the TRRO and TRO rulings concerning Verizon's unbundling obligations. SBC claims that its Batch Cut Process is purely a voluntary offering, and thus is not subject to arbitration pursuant to Section 251/252 of the Act. SBC claims that the FCC eliminated any requirement to establish a Batch Cut process, and that as a result, there is no underlying "change of law" that would provide a basis for arbitration.

We disagree that the Batch Hot Cut process is purely a voluntary offering. Although the FCC no longer mandates the state commission to establish batch hot cut processes, the ILECs still must submit orders to convert their embedded base of UNE-P customers to UNE-L or another arrangement within a 12-month period. Thus, while the FCC did not specifically prescribe hot cut processes whereby the ILECs would accomplish the conversion, it did

mandate that the conversion be completed within the 12-month period. Complying with the FCC mandate necessarily requires the ILEC to implement batch hot cut processes to convert the embedded base. Indeed, it was the recognition of this mandate that led the FCC to state that concerns about ILECs' ability to convert the embedded base within a timely manner were rendered moot. (Paragraph 216.) CLECs thus continue to have a stake how the Batch Hot Cut process is handled, and are entitled to a voice in the continuing disputes over how Batch Hot Cuts are to be carried out and priced.

We also disagree with claims that the Batch Cut Process does not involve change of law provisions. The requirement for a batch hot process was a direct result of the mandated elimination of UNE-P, which constitutes a change of law. The Batch Cut Process was first mandated in the TRO for regions where UNE-P was to be eliminated. Subsequent provisions of the TRRO did not eliminate the Batch Hot Cut requirement, but merely adopted a different approach by which it is implemented. Instead of directing state commissions to adopt specific Batch Hot Cut processes, the TRRO left it to the carriers to resolve through negotiation and arbitration.

Moreover, the TRRO specifically adopted a change of law with respect to the timetable for Batch Hot Cut processes to be completed. ILECs must convert the embedded UNE-P base to other arrangements, including UNE-L, within a 12-month period. The Batch Hot Cut process is an integral part of this conversion. Given these facts, we conclude that implementation of the Batch Hot Cut Process is a necessary component of the change of law provisions relating to the elimination of UNE-P and the mandated conversion of the embedded UNE-P base. As such, Batch Hot Cut process and pricing issues are properly within the scope of Section 252 arbitration proceedings.

Yet, because the same ILEC Batch Hot Cut processes will be used for multiple carriers, it would be an inefficient and unwise use of resources to litigate a separate arbitration for each carrier. Therefore, the most efficient path is to use a consolidated arbitration process for Batch Hot Cut issues, to be coordinated with the arbitration for other change-of-law issues.

Several parties express concerns that litigation of Batch Hot Cut process and pricing issues within the 252 arbitration process would delay the resolution of other change-of –law issues. These concerns can be addressed by the assigned Commissioner and ALJ in the respective arbitration proceedings by establishing a separate procedural track for Batch Hot Cut issues on a time table that is independent from the schedule for resolving other TRO and TRRO change-of-law issues. By treating Batch Hot Cut issues on its own separate schedule, we can avoid undue delay in arbitrating the other change-of-law issues on a timely basis. Because an extensive record on Batch Hot Cut issues has already been developed in this proceeding, including exhibits, testimony and briefs, we envision that by incorporating pertinent parts of the existing record, the final resolution of pending disputes relating to the Batch Hot Cut processes and prices could proceed on a relatively expedited basis.

Moreover, while certain parties call for a Proposed Decision to be reissued in this proceeding as a solution for speedy conclusion of all Batch Hot Cut issues, we disagree. The previously withdrawn Proposed Decision did not reach a final determination on a number of Batch Hot Cut issues, but instead ordered further workshops as a means of working out various remaining BHC disagreements among carriers. Thus, whether Batch Hot Cuts continued to be addressed through a decision in this docket or in a new one, there would still be further work involved to resolve outstanding disputes. In addition, carriers

subsequent negotiations or other industry changes may have obviated or modified various findings or conclusions in the previously withdrawn Proposed Decision. Therefore, the UNE-P Coalition's call for simply reissuing a Proposed Decision in this docket with no further consideration for updating the record for subsequent events is not appropriate.

Moreover, at the time that the previous Proposed Decision was withdrawn, questions remained as to how Batch Hot Cut pricing should be determined for Verizon. In particular, comments had been taken concerning whether prices adopted in New York should be applied in California. In order to facilitate the timely conversion of the UNE-P embedded base to other arrangements within the 12-month time frame set forth in the TRRO, we may consider applying rates based on those adopted by the New York Public Service Commission at least on an interim basis. In this manner, the batching of hot cut orders could go forward on schedule even though final prices had not yet been determined. The interim prices could be made subject to true up to allow for the final arbitration of prices to extend beyond the 12-month period mandated for the embedded base conversion. We shall consider this option further in the context of the arbitration proceeding.

We find no basis to keep the TRO Nine-Month phase open to address the additional issues raised by the Pure UNE-P Coalition in its comments. We decline to adopt the proposal to develop and adopt "preferred outcomes" as a basis for parties' negotiations. Such an undertaking is beyond the scope of the original purpose of the TRO phase. Even if such an undertaking by the Commission was otherwise warranted, the TRO phase would not be the appropriate forum in which to develop such "preferred outcomes." In any event, we conclude that, consistent with FCC mandates, the proper role for the

Commission is to monitor parties' negotiations rather than to take sides even before any contract disputes have arisen. To the extent that carrier disputes are identified through the arbitration process, the Commission can then resolve those specific disputes.

The UNE-P Coalition also asks the Commission to resolve issues relating to collocation. These issues are not within the scope of the TRO Nine-Month proceeding, but have already been previously designated as an issue within the Open Access Network Architecture and Development (OANAD) proceeding. Accordingly, it is beyond the scope of this proceeding to address the timing or substance of any applicable collocation issues since they are the subject of another Commission proceeding.

The UNE-P Coalition also proposes that the TRO proceeding be kept open to address "implementation of those portions of the TRO that were not overturned by USTA II." For example, the Coalition identifies issues concerning the commingling of UNEs and the conversion of UNEs to wholesale services. We conclude that these issues are more appropriately addressed within the context of the consolidated arbitration proceedings, as discussed above. To the extent that parties continue to disagree over such implementation issues, the consolidated arbitrations is the appropriate forum in which to bring them before the Commission for resolution.

The UNE-P Coalition also argues that the Commission should independently make unbundling determinations within the TRO proceeding pursuant to state authority. Even assuming that the Commission had such authority under state law, and elected to exercise it, the TRO phase of this docket was not initiated for that purpose, and such action would be beyond its proper scope. Moreover, we have already rejected this argument in D.05-03-027 and

D.05-03-028 in which we denied the CLECs' emergency motion seeking continuation of UNE-P after March 11, 2005, the effective date of the TRRO.

The FCC has clearly stated that "Incumbent LECs have no obligation to provide competitive LECs with unbundled access to mass market local circuit switching." (TRRO, ¶ 5, emphasis added.) In addition, it is clear that the FCC desires an end to the UNE-P, for it states ". . . we exercise our "at a minimum" authority and conclude that the disincentives to investment posed by the availability of unbundled switching, in combination with unbundled loops and shared transport, *justify a nationwide bar on such unbundling.*" (TRRO ¶ 204, emphasis added.) Therefore, there is a national bar on the provision of UNE-P, subject to the 12-month transitional process for converting the existing UNE-P customer base. Accordingly, there is no basis to keep open the TRO proceeding for further consideration of continuing UNE-P, as advocated by the UNE-P Coalition.

We disagree with the UNE-P CLEC Coalition argument that the Commission should proceed to issue a Draft Decision to establish Batch Hot Cut processes and prices in this docket, based on the existing record in the TRO Nine-Month proceeding, rather than resolve any remaining disputes through an arbitration process. Contrary to the Coalition's claim, the TRO record that was the basis for the withdrawn Batch Cut Proposed Decision no longer forms a legal basis upon which to adjudicate the Batch Cut issues dealt with in the Proposed Decision. The presumption of CLEC impairment which was the underlying basis for imposing the Batch Hot Cut requirements set forth in the withdrawn Proposed Decision is no longer applicable.

Moreover, contrary to the UNE-P Coalition's claim, by resolving Batch Hot Cut disputes through separate arbitration proceedings, we do not intend to

require parties start over or to duplicate previously completed litigation relating to Batch Hot Cut issues. We intend to make use of the previously filed briefs, exhibits, and testimony that has already been produced in the TRO proceeding to the extent such materials remain relevant in the context of prospective Batch Hot Cut requirements. Thus, by addressing remaining Batch Hot Cut disputes through a different regulatory forum, we do not intend to ignore or disregard the extensive record materials that have already been produced in the TRO proceeding relating to Batch Hot Cut issues.

Yet, any further deliberations on Batch Hot Cut issues must also take into account current law and industry conditions rather than simply reissuing the previous Proposed Decision that was based upon assumptions and precepts that have since been superceded.

In addition, the Assigned Commissioner had raised the issue of whether the processes and prices adopted by the New York Public Service Commission should be used in resolving Batch Cut issues within California. Even assuming that it was procedurally appropriate to reissue a Proposed Decision in this docket, the Commission would need to undertake additional analysis relating to the applicability to California of what was adopted in the New York Public Service Commission. Although Verizon claims that the New York processes apply equally to California, other parties have disagreed. For example, the Testimony of Robert Falcone (Exhibit 155) sets forth assertions that the New York analysis of batch hot cut processes differs from that applicable to California, and that certain issues were not addressed in the New York testimony that are at issue in California. Thus, further analysis and deliberations would be required before any final determination could be made concerning

whether, or to what extent, the processes adopted in the New York order can be equally adopted for California.

V. Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed on June 20, 2005, and reply comments were filed on June 27, 2005. We have taken the comments into account, as warranted in finalizing this order.

VI. Assignment of Proceeding

Susan P. Kennedy is the Assigned Commissioner and Thomas R. Pulsifer is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. The original purpose for which the TRO Nine-Month phase was opened has been superseded by actions of the FCC in issuing its TRRO regarding Unbundled Access to Network Elements.

2. The United States Court of Appeals for the District of Columbia Circuit issued its opinion in *United States Telecom Association v. Federal Communications Commission,* No. 00-1012 vacated provisions of the TRO.

3. The FCC issued its TRRO, adopted on December 15, 2004, and which became effective on March 11, 2005. The TRRO provides guidance concerning the change-of-law process whereby carriers are to transition from the existing system of unbundled network elements to alternative arrangements.

4. Under the TRRO, the FCC has stated that Incumbent Local Exchange Carriers (LECs) have no obligation to provide competitive LECs with unbundled access to mass market local circuit switching.

5. Under the TRRO, state commissions are no longer directed to approve batch cut migration processes, although they must still perform a role in facilitating dispute resolution.

6. Although in the TRRO, the FCC found no impairment arising from the hot cut process for the majority of mass market lines, disputes remain between carriers in California concerning batch hot cut pricing and processes relating to the conversion of CLECs' embedded base of mass market customers served by UNE-P.

7. The TRRO encourages state commissions to monitor carrier negotiations closely to ensure that parties do not engage in unnecessary delay in implementing applicable change-of-law provisions, including those relating to batch hot cuts.

8. The procedural vehicle of a consolidated arbitration is the most appropriate means for the Commission to facilitate resolution of disputes for carriers that have not yet entered into arbitration proceedings relating to batch hot cut processes and pricing or any other change-of-law provisions under the TRO, and TRRO.

9. In those instances where carriers have already entered into arbitration proceedings to implement TRO and TRRO change of law provisions, as is the case for MCI and XO, it may be appropriate to permit parties to continue to use those separate proceedings to resolve TRO and TRRO change of law implementation issues, subject to subsequent determinations by the Assigned Commissioner and arbitrator in such separate arbitration proceedings.

10. In the TRRO, the FCC has chosen to encourage parties to use state collaboratives to work out the processes necessary to support line splitting. Yet, to the extent state collaboratives fail to result in a resolution of line splitting

arrangements, the matter is appropriate to submit, along with other unresolved disputes, for arbitration.

11. Rulemaking on collocation issues is not within the scope of the TRO Nine-Month proceeding, but is already designated as an issue within the OANAD proceeding.

Conclusions of Law

1. The TRO Nine-Month Phase of this proceeding should be closed because its original scope, purposes, and mandates as prescribed by the FCC have been superseded.

2. Although remaining implementation issues need to be resolved in order for carriers to work out the necessary arrangements to implement applicable change of law provisions, including processes and pricing for batch hot cuts, a separate proceeding should be used to accomplish that implementation.

3. One consolidated arbitration proceeding should be used for all interconnection TRO and TRRO change-of-law disputes with SBC California and a separate proceeding should be used for those disputes with Verizon California, except in the case of pre-existing arbitrations. In the case of pre-existing arbitrations, it may be advisable to keep such issues in the separate arbitrations.

4. Relevant portions of the record that was developed in the TRO proceeding relating to parties' disputes over implementation of change-of-law provisions should be admitted into the record for the consolidated arbitration proceedings in accordance with procedures to be adopted by the Assigned Commissioner and / or ALJ in those arbitration proceedings.

5. In currently pending separate Section 252 arbitrations, such as those for XO and MCI, the Assigned Commissioner and arbitrator in those proceedings should determine whether, or to what extent, any TRO or TRRO change-of –law

issues should remain in the existing arbitration or should be transferred into a consolidated arbitration docket.

6. Because under the TRRO, there is a national bar on the provision of UNE-P, subject to the 12-month transitional process for converting the existing customer base, there is no basis to keep open the TRO proceeding for further consideration of continuing UNE-P under any alleged separate state authority.

O R D E R

IT IS ORDERED that:

1. Within 10 calendar days of the effective date of this decision, SBC California (SBC) shall file an arbitration application on a consolidated basis for resolution of pending disputes with carriers over Triennial Review Remand Order (TRRO) implementation issues. Any carrier that has a dispute with SBC over the terms of implementing change-of-law provisions of the TRRO is authorized to be a party of record in the consolidated arbitration.

2. The Assigned Commissioner and Administrative Law Judge (ALJ) in Application (A.) 04-03-014 shall determine whether to use that existing arbitration proceeding to resolve disputes over TRO and TRRO implementation issues involving Verizon California, or to order the opening of a new proceeding for that purpose.

3. The assigned Commissioner and ALJ in the respective consolidated arbitration proceedings shall establish a separate procedural track for Batch Hot Cut issues on a time table that is independent from other TRO and TRRO change-of-law issues in order to avoid delay in resolving change-of-law issues not related to Batch Hot Cuts. Parties may elect to participate only in the Batch

Hot Cut phase of the consolidated arbitration proceeding separately from other change-of-law issues.

4. The Assigned Commissioner and ALJ in any currently pending individual Section 252 arbitration proceeding, such as for MCI and XO, shall determine whether continue to use the existing arbitration to resolve previously raised change-of-law issues, or whether any pending issues should be transferred to one of the consolidated arbitration dockets.

5. The assigned ALJ in each of the consolidated arbitrations for SBC and Verizon, respectively, shall establish appropriate procedures to permit parties to identify relevant portions of the record from the Triennial Review Order Triennial Review Order (TRO) Nine-Month proceeding (including applicable exhibits and briefing materials) that they seek to introduce into the record of the consolidated arbitration proceeding.

6. To facilitate the exchange of discovery involving proprietary data, parties should enter into appropriate nondisclosure agreements. For this purpose, such agreements should incorporate terms for nondisclosure as previously authorized in the Protective Order adopted in the TRO phase of this proceeding.

7. The TRO Nine-Month Phase of the Local Competition proceeding is hereby closed.

This order is effective today.

Dated _____, at San Francisco, California.